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No. ——

In the Supreme Court of the United States

MARINE AVETISIAN,
Petitioner,

v.

JOHN ASHCROFT, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does Avetisian meet the prima facie eligibility threshold to sustain a Motion to Reopen to Adjust Status?

II. Is Ms. Avetisian eligible for relief under the Convention Against Torture in light of the fact that she is a victim of torture?

III. Did The Immigration Judge Err By Failing to Grant Relief from Removal under the Convention Against Torture?

IV. Does substantial evidence support a negative credibility finding where the IJ repeatedly misconstrued Ms. Avetisian's testimony?

PARTIES TO THE PROCEEDING

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OPINION BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is attached hereto as Appendix B. The petitioner filed a timely petition for rehearing, with suggestion for rehearing en banc, which was denied January 11, 2007. The Order is attached hereto as Appendix A.

The decisions of the Board of Immigration Appeals is attached hereto as Appendix C and E. The Ninth Circuit Court of Appeals consolidated the petitions from Board of Immigration Appeals decisions and is attached hereto as Appendix D. The Immigration Court did not publish an opinion in this case.

JURISDICTION

The Ninth Circuit filed its decision on November 14, 2006, and entered an order denying petitioner's Petition for Rehearing En Banc on January 11, 2007.

This petition for writ of certiorari has been filed and docketed within the time limits prescribed, as it was mailed on April 9, 2007, which is within 90 days of the denial of the petition for rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 8 U.S.C. § 208(b)(1) and 28 U.S.C. § 2347(c), which are reproduced at Appendix F, 14a-15a. The federal regulations, 8 C.F.R. § 208.13(b)(1)(i), 8 C.F.R. § 1003.2, are also involved in this case and are reproduced at Appendix F, 15a-19a.

STATEMENT OF THE CASE

Avetisian seeks review of the denial of her application for political asylum, withholding of removal and relief under the Convention Against Torture and her motion to reopen removal proceedings at the Board of Immigration Appeals.

The rules constraining the reopening of immigration cases are sometimes too strict, and are not serving the interests of the government, of the American public, of affected United States citizens, nor, obviously, of the immigrant. The executive branch's discretion to deny a motion to reopen should not be "unfettered." Specifically when an immigrant has no criminal record, but has been found not credible in an asylum application because she attempted to enter the United States with false documents to seek asylum, should she then, having married a U.S. citizen and having given birth to a U.S. citizen child, be denied the chance to adjust status because of strict and rigid rules about motions to reopen?

Avetisian, was stopped at the port of entry, was charged as inadmissible for use of a false passport, and was paroled into the United States. At a removal hearing she conceded the charge and applied for asylum. After the merits hearing the immigration judge denied asylum, making an adverse

credibility finding "based on the lack of detail in Avetisian's description of her arrests ... and his conclusion that much of her testimony was 'implausible in light of the background evidence.'" (Ninth Circuit Memorandum Opinion, November 14, 2006.)

In a summary decision the Board of Immigration Appeals declined to reverse the IJ on credibility grounds. Avetisian petitioned the Ninth Circuit for review, filing pro se.

Avetisian then moved to reopen immigration proceedings based on her marriage to a U.S. citizen, and her eligibility to adjust status to Lawful Permanent Resident under the new case *Bona v. Gonzales*, 425F.3d 663 (9th Cir. 2005). Avetisian provided new evidence that was not previously available. The BIA denied the motion on the ground that her husband did not petition for her until July 2004, which was not within the time allowed for a motion to reopen, and that, even if *Bona* had been in effect at all times, the filing of the petition was past the date on which she could have made an ordinary motion to reopen.

Avetisian sought review in the Ninth Circuit of the denial of the Motion to Reopen, and the cases were consolidated. In Ninth Circuit mediation the Department of Justice would not reopen on account of the prior false documents.

The Ninth Circuit denied her combined petitions for review on November 14, 2006. The Ninth Circuit reasoned that the adverse credibility finding by the immigration judge is "supported by substantial evidence," that the BIA did not "abuse its discretion in denying Avetisian's motion to reopen because it was untimely," and that it did not have jurisdiction to review the BIA's refusal to reopen sua sponte.

STATEMENT OF FACTS

Marine Avetisian was born in Armenia on December 11, 1973. She had no brothers or sisters. Her father was from Greece and her mother was born in Romania. At the time her problems started in post-Soviet Armenia, Avetisian's father was deceased, and her mother was very ill.

Armenia declared its independence from the former Soviet Union in 1991, and, after-years of political stalemate, a constitution was adopted in 1995 favoring the executive over the legislature.

Avetisian completed 15 years of schooling when she graduated from accountant college in Armenia. She never had an occupation in Armenia. She and her mother joined the Pentecostal church in 1992. (Avetisian, born in December 1973, would have been 18 or 19 years old at that time.)

Her family's home was confiscated before Avetisian's first departure from Armenia in August 1993. Some putative authority, in the chaos of Armenian politics in 1993, took the family's property because Avetisian's parents were not born in Armenia; despite having property, the family "did not have any place in that country." The implicit ostracism of the foreigner in Armenia became explicit with the confiscation of the Avetisian property.

Avetisian and her mother suffered from persecution on account of their Pentecostal religious practices, which were highly disfavored in Armenia.

felt more abuse than the average "foreigner" in Armenia whose property was confiscated: the fact that they had turned to the Pentecostal religion meant that "there was not a good

etiquette towards us, because we had turned to the Pentecostal religion, so that's the reason that we went to Romania."

Avetisian had hoped to attend the University in Romania.. However, life in Romania was too oppressive. Avetisian's mother was very sick, and Avetisian had to look for work, but hardly found any work.

Avetisian found it very hard to work in Romania for two overt reasons. First, there was hostility and suspicion against her for being from one of the Soviet republics, and "their etiquette towards us was very bad." Second, her Pentecostal beliefs handicapped her in the job market, because she was unwilling to wear a lot of makeup and short skirts, which is the norm for young women in Romania. Despite her unfashionable appearance, she did manage to get hired, for a day or two, sometimes. These jobs were abruptly terminated when she had to show her papers, showing that she was from the Armenian republic of the USSR. She did once have a job with an Armenian man in Romania, baking cookies for him, but she lost the job when she got a bad cut on her finger.

Unable to support themselves in Romania, Avetisian and her mother accepted charity from church members who gave them food. Yet there were times when they were starving. They tried to sell their gold jewelry for living expenses. The pawn broker betrayed them - after they showed their Armenian documents, and called the authorities. The authorities told them that they had no right to sell gold, and simply confiscated the jewelry. The jewelry of these two women consisted of two neck chains, two watches, her mother's wedding rings and two other rings.

Avetisian was not able to practice her religion freely in Romania. The country is Orthodox, and the populace is

hostile toward Pentecostals. The Romanian children would throw stones at the congregants as they left church, shouting insults about the Pentecostal faith. The church members had tried to get help from the authorities, but the police shrugged it off, saying they could not do anything about little children misbehaving.

Even though she acquired Romanian citizenship, Avetisian feels that she cannot return to live in Romania, because she saw nothing but suffering and hurt during her seven years there.

Driven out of Romania by the threats of religious persecution, she returned to Armenia in June 1999. In Armenia graver trouble ensued. Armenia has an atrocious human rights record. They do not hesitate to arrest, torture and even kill persons who may be perceived to be "enemies". Having resided in Romania since August 1993, and having always been ostracized in the land of her birth before her departure, she was treated atrociously upon her return.

She was arrested on July 3, 1999, just a few weeks after her return to Armenia. She was kept overnight, and beaten very badly. They detained her overnight twice, the second time being December 12, 1999. The times they kept her overnight, she was beaten severely. Just the thought of the abuse is painful for Avetisian."When I remember all this stuff, actually I m trying to forget all of it because it hurts me, just remembering hurts me. And maybe that's why I m confusing sometimes."

Avetisian had at least 20 encounters with the organization she calls the KGB in Armenia, when they took or called her in. She thinks that they actually took her in six or seven times. They came frequently to harass her, sometimes twice

a month and sometimes not for several months. They would take her to a KGB police station and ask repetitive questions. She would be kept for 30 minutes or up to two hours.

Avetisian refers to her captors as "KGB." They did not identify themselves with an organizational name, but they took her to the building and demanded information. She acknowledges that the name of the KGB organization may have changed after independence from the USSR, "but the building is the same, the people are the same, and the leaders are the same. It's all the same."

Avetisian also thinks that Armenia remains a repressive society to this day. "You know what, the names are changed, but the mentality, ideas and the ways to live for life are basically the same... it has declared independence, but the country and the people and the mentality, they are the same."

When they arrested her, the officials showed badges, but Avetisian never saw their names. When they took her away and abused her, they told her that it was because she had spent seven years in Romania. They accused her of involvement in unidentified anti-Armenian activities and organizations, and of gathering information for those organizations. They never specified any organizations by name. The second time, the were trying to find out if she was connected with someone named Korium. They asked the same questions over and over, and she told them over and over that she did not know, and did not know what they wanted from her. She has no idea why they have such suspicions.

She believes that, if she returned to Armenia, they would immediately take her, blame her and interrogate her for anti-government activities. Only four months before her

deportation hearing, someone had come from Armenia with news that the KGB continues to look for her.

Ms. Avetisian fled Armenia and traveled to the United States with an altered passport. She was arrested and detained upon her arrival at the San Francisco airport on July 19, 2001.

Proceedings with the immigration court commenced on August 6, 2001, with the filing of the NTA.

At a hearing on October 17, 2001, Ms. Avetisian appeared before an immigration judge with her previous counsel, conceded removability, and declined to designate a country of removal. As relief from removal, Ms. Avetisian requested political asylum, withholding of removal, and withholding of removal under the Convention Against Torture.

On January 23, 2002, the immigration judge denied her application for asylum, withholding of removal, and relief under the Convention Against Torture.

Petitioner appealed to the Board of Immigration Appeals. On December 24, 2003, the Board affirmed, without a separate decision, the Immigration Judge's decision.

On January 15, 2004, petitioner pro se filed a timely petition for review with the U.S. Court of Appeals for the Ninth Circuit. On October 22, 2004, Ms. Avetisian through the undersigned counsel filed a motion to reopen the proceedings before the Board and remand her case to the Immigration Judge for adjustment of status. On January 10, 2005, the Board denied Ms. Avetisian's motion as untimely filed.

Ms. Avetisian filed a second petition for review with the U.S. Court of Appeals for the Ninth Circuit. On February 23, 2005, this Court sua sponte consolidated both cases.

In the meantime, Avetisian has married a U.S. citizen and given birth to a daughter. Together they have a happy life. Her husband is very much in love with her. The result of her removal would be a disaster for her U.S. citizen daughter and U. S. husband, who had many personal and drug abuse problems before marrying her, but now is relatively stable and successful as a result of her nurturing qualities and their happy life together.

REASONS FOR GRANTING THE WRIT

a. Avetisian met the prima facie eligibility threshold to sustain a Motion to Reopen.

(1) Motions to Reopen are Subject to an Abuse of Discretion Standard of Review

Avetisian urges this Court that the Ninth Circuit applied an incorrect standard, inconsistent with a long line of precedent decisions. The leading decision, by this court, relating to discretion and motions to reopen is *INS v Abudu*, 485 US 94 (1988). While the *Abudu* Court limits it's decision to a specific issue with regard to asylum-based Motions to Reopen, in dictum, the Court states, "although all adjudications by administrative agencies are to some degree judicial and to some degree political – and therefore an abuse-of-discretion standard will often apply to agency adjudications not governed by specific statutory commands."

The Ninth Circuit Court of Appeals in *Petrosyan v Gonzales*, 2007 U.S. App. LEXIS 5510 (9th Cir. Fed. 14,

2007) acknowledges that the BIA has discretion to deny a "motion to reopen 'even if the party moving has made out a prima facie case for relief.,' 8 C.F.R. § 1003.2(a)." However, the *Petrosyan* Court also states, "we 'will reverse a denial of a motion to reopen if the denial was arbitrary, irrational, or contrary to law,' *Bhasin v. Gonzalez*, 423 F. 3d 977, 983 (9th Cir. 2005)." The denial of Avetisian's Motion to Reopen was an arbitrary, irrational and contrary to law. The *Petrosyan* Court notes that a "motion to reopen must 'state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.' 8 C.F.R. § 1003.2(c)(1)." The *Petrosyan* Court states that the "evidence presented must be 'material,' and the applicant must show that the evidence 'could not have been discovered or presented at the former hearing.' 8 C.F.R. § 1003.2(c)(1)."

The IJ denied Ms. Avetisian's asylum claim in January of 2002 and Ms. Avetisian was married in November of 2003. She could not have introduced this evidence to the immigration judge at her hearing. Avetisian's marriage is certainly material, as it changes her ability to apply for legal status in the United States.

The *Petrosyan* Court remanded saying, "the BIA abused its discretion in declining the motion to reopen to consider the new evidence" because the "newly tendered evidence supports a prima facie case that Petrosyan is eligible for asylum." Indeed, Ms. Avetisian, who now has an approved I-130, has presented new evidence that supports a prima facie case for adjustment of status.

(I) Ms Avetisian has established a prima facie case of eligibility for the underlying relief sought.

"Motions to reopen in removal proceedings will not be granted unless the respondent can show that the evidence sought to be offered is material and was not available at his former hearing. 8 C.F.R. §3.2(c)(1) (2000). A motion to reopen must state the new facts to be proved and must be supported by affidavits or other evidentiary material. *Id.* In addition, a motion to reopen will not be granted unless the respondent establishes a prima facie case of eligibility for the underlying relief sought. See *INS v. Abudu*, 485 U.S. 94 (1988)." *Matter of S-V-*, #3430, 22 I&N Dec 1306 (BIA 2000).

Prima facie eligibility for relief is shown where the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied. *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996). Prima facie eligibility does not require a conclusive showing that eligibility for relief has been established. Proceedings can be reopened "where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening." *Matter of L-O-G-* at 419, *Matter of S-V-* at 1308, (quoting, *Matter of Sipus*, 14 I&N Dec. 229, 231 (BIA 1972)).

The court can be further guided by the decision of the BIA *In re Mario Eduardo Velarde- Pacheo*, 23 I&N Dec. 253 (BIA 2002). The Board granted a Motion to Reopen because of his pending adjustment based on his bona fide marriage to a U.S. citizen. The Board in *Valerde* requires that the Respondent show "clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona

fide." In granting the motion the Board noted that Valerde submitted his receipt for the I-130 filing fee, his marriage certificate, an I-485 indicating that he has lived with his wife since 1999 and an affidavit stating that he has known his wife since 1995. This was considered by the Board to be clear and convincing evidence. Ms. Avetisian...

In addition, Ms. Avetisian was paroled into the United States therefore she is eligible to adjust status pursuant to the Ninth Circuit decision in *Bona v. Gonzales* . "As a result of regulatory changes arising from nationwide litigation, see, e.g., *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005) [Agreeing with *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), and disagreeing with *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005), and finding that an arriving alien in removal proceeding may adjust status], "arriving aliens" are no longer barred from A/S before USCIS, and may seek to adjust status before the IJ if they are returning on an advance parole, USCIS has denied their A/S, and they are placed in removal proceedings. 8 C.F.R. §§245.2(a)(1), 245.2(a)(5)(ii), 1240.11(a)(1), 1245.2(a)(1), 1245.2(a)(5)(ii); 71 Fed. Reg. 27585-92 (May 12, 2006) [Withdrawing 8 C.F.R. §§245.1(c)(8) and 1245.1(c)(8), which barred arriving aliens from adjusting status]. See also *Matter of Artigas*, 23 I&N Dec. 99 (BIA 2001) [A Cuban adjustment applicant who is an arriving alien may adjust before the IJ because his application is under §1 of the Cuban Adjustment Act and not under INA §245]. Under pre-IIRIRA law, a paroled alien could adjust before DD but not in an exclusion proceeding. «*Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004)» [Upholding limitation on adjustment before DD for excludable persons who were paroled into the U.S. because under the "entry doctrine" fiction, a person seeking admission does not have an equal protection right to the same procedures for A/S before the IJ as a deportable person]." *Kurzban* IV(L)(5)(c)

The denial of Avetisian's Motion to Reopen was an arbitrary, irrational and contrary to law. The "evidence presented must be 'material,' and the applicant must show that the evidence 'could not have been discovered or presented at the former hearing.' 8 C.F.R. § 1003.2(c)(1)."

The IJ denied Ms. Avetisian's asylum claim in January 2002, and Ms. Avetisian was married in November of 2003. She could not have introduced this evidence to the immigration judge at her hearing. Avetisian's marriage is certainly material, as it changes her ability to apply for legal status in the United States.

(2) The Abuse of Discretion Standard of Review Applies to Sua Sponte Motions to Reopen

Ms. Avetisian's Motion to Reopen is not within the 90 day time limit set by 8 CFR 1003.2(c) and therefor not necessarily subject to the "discretion" analysis set forth above. The proper analysis may be limited to "discretion" as it relates specifically to sua sponte motions under 8 CFR 1003.2(a). The Ninth Circuit, in it's Memorandum Decision of November 14, 2006, cites *Ekimian v INS,* 303 F.3d 1153 (9th Cir. 2002) as controlling with regard to jurisdiction to review Sua Sponte Motions to Reopen before the BIA. The *Ekiminian* Court concludes that they do not have jurisdiction over the Board's sua sponte power because there is no "meaningful judicial standard for reviewing the BIA's discretion." The *Ekimian* Court looks to the First Circuit Court's decision in *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999) for the conclusion that, "the decision of the BIA whether to invoke its sua sponte authority is committed to its *unfettered discretion*. Therefore the very nature of the claim renders it not subject to judicial review." [emphasis added]

The Court may be better informed by the dissent of Judge Bright in *Ekimian, Id.* Judge Bright says, "the interest of justice demands that an administrative agency be held accountable for its decisions." Judge Bright continues, "In this country and under our laws, we typically do not leave individuals' liberty interests to the 'grace' of bureaucrats, even well-intentioned bureaucrats. It is only in the rarest of cases where discretion is left entirely unfettered. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 139-41 (1967)."

Bright states that the BIA "body of case law" he reviewed, and the cases cited by the majority pertaining to exceptional circumstances, "ought to be sufficient for us to unearth a meaningful standard of review; especially when the alternative is to leave matters to the 'unfettered' 'grace' of the agency." Judge Bright would allow for review, and indeed reversal, if the BIA "gave no indication of considering certain pertinent factors in denying" a sua sponte motion to reopen.

Indeed, the BIA in their decision of January 10, 2005, herein, does not address any issues at all, other than the ninety-day filing deadline for Motions to Reopen. There is no consideration for the hardship to Ms. Avetisian's U.S. citizen husband and daughter, the contribution that her business makes to the community and the fact that her married status is "new evidence."

(3) Alternatively, Motions to Reopen may be filed under 28 USC § 2347(c), rather than 8 C.F.R. 1003.2

The court can also be guided by the Ninth Circuit's decision in *Bolshakov v INS,* 133 F.3d 1279 (9th Cir. 1998) The *Bolshakov* Court found that even though Mr. Bolshakov's MTR, pursuant to 8 C.F.R. § 1003.2, was filed beyond the 90 filing deadline, he is still authorized to file the motion,

alternatively, under 28 U.S.C. section 2347(c). The *Bolshakov* Court states that "under that statute we may compel the BIA to rehear the case if the new evidence is material and there were reasonable grounds for failing to present it initially."

The *Bolshakov* Court ultimately denied the Motion to Reopen because the motion was not based on entirely "new" evidence. Mr. Bolshakov wanted to reopen to adjust based upon his status as a "gifted artist." The Court found that Mr. Bolshakov's "gifted artist" status was not an entirely recent development or "new" evidence" because he qualified for this status when he first entered the United States. Not so with Ms Avetisian. She was not married until after her immigration court proceedings were completed. Her husband filed an I-130 petition a few months later, in 2004, and only received an approval of the marriage petition in November of 2006. There were no "dilatory tactics" involved.

b. The substantial evidence supports a negative credibility finding where the IJ repeatedly misconstrued Ms. Avetisian's testimony

To begin, the IJ says that Avetisian's testimony, even if true, provides "no evidence that [she] could not return to either country without incident." This is an extremely prejudiced finding. While allegedly crediting the testimony, the IJ finds that it is not evidence. From such a beginning, where could one possibly arrive?

The IJ is concerned with the lack of documents, such as police reports and arrest reports. But the evidence shows that such documents are not available from Armenia. Moreover, this Court has established that it is inappropriate to base an adverse credibility determination on an applicant's inability to

obtain corroborating evidence of a direct threat because"[a]uthentic refugees rarely are able to offer direct corroboration of specific threats." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984). Indeed, "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Id.*

The IJ finds that there is no proof that Avetisian is of the Pentecostal religion, "other than her own testimony." Admittedly the direct examination rested on Avetisian's testimony. But the INS attorney and the immigration judge did not question her testimony during the hearing.

The IJ then began to justify a finding that Avetisian was not credible. He adopted the argument that Avetisian must have entered the United States in 1998, when the passport entered the first time. "The documentary evidence speaks for itself." Well it does not exactly speak for itself. When Avetisian told the airport inspector that she had been in the United States before, she was not believed. "[S]he cannot answer basic questions about her first trip; such as where she stayed, what airline she traveled on, [or] how long she was here." It seems obvious (though the question was not asked) that she saw immigration stamps in the passport, and realized that, if questioned, she had to pretend to have entered once before. (The INS attorney pointedly did not submit the passport into evidence, though he showed it in the courtroom for impeachment.) Beyond knowing that there was a prior entry and perhaps the approximate date, Avetisian knew nothing about any previous trip to the United States. The documents, if they speak for themselves, do not shout that Avetisian was lying in her asylum application and hearing. Rather they tend to prove that Avetisian had never been in the United States before, just as she testified in court.

The IJ returns to this same issue again, with the same result. And again, almost in the next breath.

(2)

The IJ finds a supposed inconsistency between Avetisian's written declaration and her testimony about when she was beaten. This is not true. The declaration specifically mentions beating only for the first arrest in July 1999. It mentions two other arrests by date, December 1999 and May 2001. There is no inconsistency in this. "It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application." *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant s initial statements at the airport). *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired," and failure to present copy of threatening note, not a basis for negative credibility). In *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005), the Ninth Circuit found that "the phenomenon of poor date recollection is often particularly evident in the culturally diverse and trauma-filled setting of refugee claim adjudication."[1] This Court further found that 'the reason for

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[1] As noted in a recent empirical study of Kosova and Bosnian refugees:

> Laboratory and field studies have shown that people recall more details that are central when an event has a high level of emotional impact, such as armed robbery, than when an event is emotionally neutral. Their recall of central details is, however, at the expense of their recall of peripheral

applicants' lapses in date recollection is that calendar dates are frequently not part of the direct mental picture of an event that is recorded in one's memory. Scientists have identified a commonly-held and mistaken "chronological illusion" that considers chronology to be intrinsic to autobiographical memory." *Id.* "In fact, accurately described, chronology is but a "thin veneer on the more basic substance of coincidence, locations in recurrent patterns, and independent sequences of meaningfully related events." *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005).

(3)

The very act of returning to Armenia raised suspicions of dark motives. . (Attention is called to an apparent error in the transcript or in the testimony. In the context of explaining conditions in Romania, counsel asked Avetisian, "Were you already a Pentecostal when you moved to Armenia?" Since the testimony had just been that Avetisian moved to Romania, and since Avetisian was born in Armenia, and converted to Pentecostalism in 1992, this seems to be an error. The next question also mistakenly refers to Armenia. Since these two questions are disjointed from any of the other testimony, the error should be harmless, but every "inconsistency" is being marshaled against Avetisian's credibility.)

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details. Also, peripheral detail is more susceptible to disruption after the event.

Jane Herlihy et al., Discrepancies in Autobiographical memories - Implications for the Assessment of Asylum Seekers: Repeated Interviews Study. 324 Brit. Med. J. 324, 325 (2002) (emphasis added) (endnote omitted).

(4)

Next the IJ trivializes the question of the lipstick for the passport photo and Avetisian's otherwise resolute abstention from makeup. Moreover the IJ finds it "just is not plausible and not believable" that she would have had trouble finding and holding work in Romania without wearing makeup. The IJ has no discernible basis for such a finding. "Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000); see also *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant s departure); *Singh v. INS*, 292 F.3d 1017, 1023-24 (9th Cir. 2002) (assumption regarding police motives); *Gui v. INS*, 280 F.3d 1217, 1226 (90) Cir. 2002) (IJ's opinion "as to how best to silence a dissident" not a legitimate basis); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (rejecting BIA's unsupported assumptions regarding the plausibility of applicant's political activities); *Bandari v. INS*, 227 F.3d 1160, 1167-68 (9th Cir. 2000) ("IJ's subjective view of what a persecuted person would include in his asylum application," personal belief that applicant should have bled when he was flogged, and speculation about a foreign government's educational policies); *Shah v. INS*, 220 F.3d 1062, 1069, 1071 (9th Cir. 2000) (State Department conjecture about the effect electoral victory would have on existing political persecution, BIA's belief about what a letter should look like, and how many the applicant should have received); *Lopez-Reves v. INS*, 79 F.3d 908,.912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

(5)

The same authority contradicts the IJ's speculation, next, about Avetisian being fired from jobs in Romania when she had to show her Armenian documents. "[I]t's reasonable to assume it's customary in normal employment application during the submission of biographic evidence and information to put down on an application where one s origin is.... this Court would find that they knew from the beginning that she was from the Soviet Union, so for her to say that she was fired after they found out that she was from the Soviet Union seems to be inconsistent with the complete hiring process. How could the IJ know the "complete hiring process" in small towns in Romania? It is pure speculation. "[W]hat sounds peculiar in one country may be the norm in another. Consequently, non-evidence-based assumptions about the context of other cultures must be closely scrutinized." *Chouchkov v. INS*, 220 F.3d 1077, 1083 n.15 (9th Cir. 2000); *Abovjan v. INS*, 219 F.3d 972, 979 (9th Cir. 2000). See also, *Perez-Alvarez v. INS*, 857 F.2d 23, 24 (1st Cir. 1988), incorporating by reference and adopting a BIA member's opinion that said in part: "As a general rule, in considering claims of persecution, I think it is highly advisable to avoid assumptions regarding the way other societies operate. Time and again this Board has considered appeals in which assumptions of this nature have been proven to be totally incorrect . . .").

(6)

The IJ next finds a supposed inconsistency with the State Department country report, saying that the law allows foreigners to acquire Armenian citizenship. This goes too far. There is no evidence how this law is applied in fact. The State Department, while diplomatic in some respects, simply says,

"the Government's human rights record was poor in several important areas...." The fact that citizenship might be available to a foreigner does not tell how Avetisian was treated. It is improper to rely "on a factually unsupported assertion in a State Department report to deem [an applicant] not credible." *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). The Ninth Circuit has stated that "[we have never assumed that all potentially relevant incidents of persecution in a country are collected in the State Department's documentation. As the Seventh Circuit recently explained, State Department 'reports are brief and general, and may fail to identify specific, perhaps local, dangers to particular, perhaps obscure, individuals.'" *Hand v. INS*, 222 F.3d 1066, 1077 (9th cir. 2000), quoting *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000).

The grant of citizenship does not necessarily confer equality (North Koreans in South Korea, Black Africans in the United States before 1964 etc.). Moreover, even though Ms. Avetisian claims that she is a citizen of both Armenia and Romania, it does not mean she is. The Law of the Citizenship of the Republic of Armenia does not allow dual citizenship[2], and Ms. Avetisan cannot loose her Armenian citizenship unless it is renounced.

(7)

Next the IJ finds it "not plausible" "not believable" and "simply not reasonable to assume that someone could be arrested six or seven times, taken into custody, and asked

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[2] *A citizen of the Republic of Armenia may not be a citizen of another country at the same time.* Article 1 of the Law of The Citizenship of the Republic of Armenia.

about someone named Korium and nothing else." Perhaps the IJ has not heard of "unreasonable" persecution. What is a refugee to do if the persecutors are ostensibly unreasonable - if the decision to persecute is carried out with no display of reason? What of pure torture - what reasonableness does the torturer have to show in order for the refugee to win her case?

Although the KGB may no longer technically exist, the people, the physical plant and the power structures are directly from the Soviet regime, and to that she refers. Avetisian is not sure what the organization calls itself now. It its brief, the government fixates on the exact name, which here is relatively unimportant, and not relevant to the credibility determination.

(8)

The IJ finishes with two separate citations of the supposed "fact" that Avetisian had traveled to the United States in 1998, with the same altered passport. This fact was discussed above, where the IJ first made his point. The record does not impeach Avetisian on this. Indeed, it does not seem to have been difficult for the airport inspectors in 2001 to notice the photo-substituted passport. Assuming that the inspectors in 1998 were likely to be as competent as in 2001, the 1998 entry was probably legitimate. Even if the 1998 entry was not legitimate, the record shows that Avetisian did not know anything about it, and perhaps someone else used the altered passport. But if someone went to the trouble and undoubted expense of obtaining a false passport, why would that person come only for a short visit? This is an incredible premise of the government s argument, and of the IJ's conclusion.

That is her story. There is some truth in it, and she is entitled to be heard rather than dismissed. Her hearing was very skeletal and nothing was really fleshed out. She deserves a chance to fully explain to the court what her beliefs are, what her exact actions were, 'what happened as a result, and then the court can make a logical and reasoned decision as her eligibility for asylum. The judge who heard her case, merely smeared her entire story with fraud because of the admitted passport problem. The case must be remanded, to serve justice.

c. Ms. Avetisian does not have to prove being singled out for persecution regarding group-based risk of persecution.

To prove the objective component of well-founded fear, and thereby asylum, Ms. Avetisian needs to prove either (1) that there is "a pattern or practice" of persecution, or else (2) that she is a member of a "disfavored group" and she is within a sub-group of the disfavored group that faces heightened persecution. Sael, 386 F.3^{d} at 925; See *Kotasz v. INS*, 31 F.3d 847, 854 (9th Cir. 1994).

Ms. Avetisan suffered from persecution on account of her Pentecostal practices, which were highly disfavored in Armenia. The Soviet Constitution guaranteed the freedom of religion, but the clause had no real effect. There is a plethora of evidence that the Soviet Union was the first state to have as an ideological objective the elimination of religion. The Communist regime confiscated church property, ridiculed religion, harassed believers, and propagated atheism in the schools. Resistance to Soviet rule, separatism, and widespread collaboration with the German occupation forces were among the official reasons for the deportation of these non-Russian people. Actions toward particular religions, however, were

determined by State interests, and most organized religions were never outlawed. Even after the collapse of the Soviet Union, many countries implemented laws or regulations that favored certain religions and placed others at a disadvantage. It stemmed from the emergence of a country from a long period of Communist rule, in which all religion was prohibited or at best out of favor. In such countries, including Armenia, skepticism or even fear of certain religions or all religions lingered within segments of society.

In Armenia the Armenian Apostolic Church, the national church, is not subject to same restrictions on religious freedom that are imposed on members of other faiths. It is well documented that even after the collapse of the Soviet Union, Armenia only tolerates the Apostolical faith. Other brands of Christianity are scorned and scapegoated.[3] It is well reported that Armenian authorities have broken up meetings of Pentecostal Christians and Jehovah's Witnesses, who have faced harassment, arrest, detention, restrictions on preaching, fines, and in the case of foreigners, deportation.

Totalitarian and authoritarian regimes are defined by the degree to which they seek to control thought and expression, especially dissent. It is not uncommon for such regimes to regard minority religious groups as enemies of the State because of the content of the religion, the fact that the very practice of religion threatens the dominant ideology (often by diverting loyalties of adherents toward something beyond the State), the ethnic character of the religious group, or a mixture of all three.

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[3] Scapegoat- a person or a group made to bear the blame for others or to suffer in their place. Webster's College Dictionary 1198 (Random House, 1995).

Moreover, being a member of Pentecostal religion, Ms. Avetisian is eligible for a refugee status as "Priority 2"[4] group of special humanitarian concern to the U.S. as identified in the Lautenberg Amendment. The immigration judge did not consider Ms. Avetisian's risk of persecution as Pentecostal faith with heightened persecution within a general disfavored group.

d. The Immigration Judge Erred By Failing to Grant Relief from Removal under the Convention Against Torture

An applicant who is ineligible for asylum is not automatically disqualified from withholding of removal under the Convention Against Torture (CAT). A court must analyze these issues separately.

> [C]ountry conditions alone can play a decisive role in granting relief under the Convention, and . . . under a plain reading of the relevant statutory and regulatory language, relief under the Convention does not require that the prospective risk of torture be on account of certain protected grounds. We therefore conclude that

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[4] ***Priority 2 (P-2)***:
is used for groups of special humanitarian concern to the United States. It includes specific groups (within certain nationalities, clans or ethnic groups) identified by the Department of State in consultation with the Department of Homeland Security, non-governmental organizations (NGOs), UNHCR, and other experts.
P-2 "In-country" processing programs:
Former Soviet Union
This P-2 designation applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious activists identified in the Lautenberg Amendment with close family in the United States.

> the inability to state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture.

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001).

The implementing regulations for the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[5] define torture as:

> "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. §208.18(a)(1).

The burden is on the applicant to prove that she would more likely than not be tortured if returned to his country. The courts may examine all evidence relevant to the possibility of future torture, including past torture, and gross

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[5] Ratified by the U.S. Senate on October 27, 1990. 136 Cong. Rec. S17486-92 (daily ed. Oct. 27, 1990). Implemented by February 19, 1999 U.S. Department of Justice Rule. See 8 C.F.R. §208.18.

and flagrant human rights abuses in the country in question, among other factors. 8 C.F.R.§ 208.16 (c)(2) and (3).

The Ninth Circuit has held that consideration of a claim under the Convention Against Torture is analytically distinct from consideration of an asylum claim. The Board may not "[conflate] the burden of proof for an asylum claim with that for relief under the Convention...Pursuant to 8 C.F.R. §208.16(c)(3), 'all evidence relevant to the possibility of future torture shall be considered," even apart from any prior findings in the asylum context. Kamalthas.

The IJ treated Ms. Avetisian's Convention claim as wholly ancillary to her claims for asylum and withholding of removal. The failure to consider the Convention claim on its own merits and separately was an abuse of discretion. The IJ conducted no analysis of the CAT claim, but instead summarily denied it at the end of his order. The immigration judge notes that although the respondent says she was beaten on two occasions, the occasion time-line dates, the circumstances surrounding these beatings, the perpetrators of the alleged mistreatment all seem to be subject to credibility issues." Subsequently, he denied Ms. Avetisan's CAT claim "based upon her lack of credibility and internal relocation being an option.."

The judge "addressed the Convention claim 'in a minimalistic and non-detailed manner,' and had overrelied on [his] adverse credibility determination in the asylum context . . ." *Kamalthas*, 251 F.3d at 1283.

Indeed, the Board must analyze the CAT claim independently of the IJ's credibility finding and decision on asylum. The Ninth Circuit held that they "are not comfortable with allowing a negative credibility determination in the

asylum context to wash over the torture claim; especially when the prior adverse credibility determination is not necessarily significant in this situation . . ." *Id.* at 1284 (quoting *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000)).

Armenia suffers from a gross and flagrant abuses of human rights. This was the case when Ms. Avetisian left Armenia and it is true today.

Taking into account the conditions in Armenia, Ms. Avetisian's own testimony, and her membership in "Priority 2" group as identified in Lautenberg Amendment, Avetisian has established that she is more likely than not to suffer torture if she returns to Armenia. She is therefore eligible for relief from removal under CAT. The IJ abused his discretion by not considering the CAT claim on its own merits, separate from the credibility finding on the asylum claim.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JUDITH L. WOOD
Counsel of Record for Petitioner
201 South Santa Fe Avenue
Suite 101
Los Angeles, CA 90012
(213) 680-7801

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 04-70247, 05-70619
Agency No. A79-369-862

[Filed January 11, 2007]

MARINE AVETISIAN,	)
Petitioner,	)
	)
v.	)
	)
ALBERTO R. GONZALES,	)
Attorney General,	)
Respondent.	)
	)

ORDER

Before LEAVY, GOULD, and CLIFTON, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-70247, 05-70619
Agency No. A79-369-862

[Filed November 14, 2006]

MARINE AVETISIAN,
Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General,
Respondent.

JUDGES: Before: LEAVY, GOULD, and CLIFTON, Circuit Judges.

OPINION
MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

In these consolidated petitions, Marine Avetisian, a native and citizen of Armenia, petitions for review of the decisions of the Board of Immigration Appeals ("BIA")(1) affirming without opinion an immigration judge's ("IJ") order denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"); and (2) denying her motion to reopen proceedings to apply for adjustment of status. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review credibility findings under the substantial evidence standard, and will reverse only if the evidence compels a contrary result. *Singh-Kaur v. INS*, 183 F.3d 1147, 1149-50 (9th Cir. 1999). We review for abuse of discretion the denial of a motion to reopen. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (*en banc*). We deny the petitions for review.

The IJ's adverse credibility finding was based on the lack of detail in Avetisian's description of her arrests, *see Singh-Kaur*, 183 F.3d at 1153, and his conclusion that much of her testimony was "implausible in light of the background evidence," *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001). We are therefore not compelled to find Avetisian credible. *See Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) ("So long as one of the identified grounds is supported by substantial evidence and goes to the heart of [the petitioner's] claim of persecution, we are bound to accept the IJ's adverse credibility finding.").

Because we conclude that the adverse credibility determination is supported by substantial evidence, Avetisian has failed to show eligibility for asylum or withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). Because Avetisian's CAT claim relies on her testimony about her arrests, that claim also fails. *See id.* at 1157.

The BIA did not abuse its discretion in denying Avetisian's motion to reopen because it was untimely. *See* 8 C.F.R. § 1003.2(c)(2) (requiring a motion to reopen to be filed "no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened"). Avetisian has not demonstrated that any exception to this rule applies to her case. To the extent Avetisian contends the BIA should have sua sponte reopened her case, we lack jurisdiction to consider the issue. *See Ekimian v. INS*, 303 F.3d 1153, 1159-60 (9th Cir. 2002).

Avetisian's remaining contentions lack merit.

PETITIONS FOR REVIEW DENIED.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
3201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Wood, Judith L., Esquire
201 S. Santa Fe Avenue
Suite 101
Los Angeles, CA 90012-0000

Office of the District Counsel/SF
P.O. Box 26449
San Francisco, CA 94126-6449

Name: AVETISIAN, MARINE A79-369-862

Date of this notice: 01/10/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/_____
Frank Krider
Chief Clerk

Enclosure

Panel Members:
MOSCATO, ANTHONY C.

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79 369 862 - San Francisco Date: Jan 10 2005

In re: MARINE AVETISIAN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Judith L. Wood, Esquire

ON BEHALF OF DHS:
Scott Laurent
Assistant Chief Counsel

Julia C. Chimarusti
Assistant Chief Counsel

ORDER

PER CURIAM. The motion to reopen has been filed out of time and will be denied. The final order in these proceedings was entered by the Board on December 24, 2003. Pursuant to 8 C.F.R § 1003.2(c)(2) (with certain exceptions not pertinent here), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant

case, a motion to reopen would have been due on or before March 23, 2004. The record reflects, however, that the Board did not receive the motion until October 22, 2004. The motion to reopen was therefore filed out of time.

Accordingly, the motion to reopen is denied.

/s/_____
FOR THE BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 04-70247, 05-70619
Agency No. A79-369-862

[Filed February 23, 2005]

MARINE AVETISIAN, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	)

ORDER

The court *sua sponte* changes the docket in No. 04-70247 to reflect that Alberto R. Gonzales, Attorney General, is the proper respondent. *See* Fed. R. App. P. 43(c)(2). The Clerk shall amend the docket in No. 04-70247 to reflect the above caption.

The court *sua sponte* consolidates these petitions for review. *See* 8 U.S.C. § 1252(b)(6).

Respondent previously filed a statement of non-opposition to the motion for stay of removal in No. 04-70247. Pursuant to Ninth Circuit General Order 6.4(c) , the temporary stay of removal continues in effect until issuance of the mandate, or future order of the court. If the Agency granted voluntary departure, and the stay motion was filed within the voluntary departure period, the voluntary departure period is stayed *nunc pro tunc* to the filing date of the stay motion, and also continues in effect until issuance of the mandate, or further order of the court. *See Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004). The motion for stay of removal in No. 05-70619 is unnecessary.

Respondent shall file a supplemental certified administrative record containing the record of proceedings at issue in No. 05-70619 no later than April 8, 2005. Petitioner shall file a supplemental opening brief addressing the issues raised in No. 05-70619 no later than May 18, 2005. Respondent's supplemental answering brief is due on June 20, 2005. The optional supplemental reply brief is due 14 days after service of the answering brief.

For the Court

/s/_____
Steven Rosenberg
Motions Attorney/Deputy Clerk
9th Cir. R.27-7
General Orders/Appendix A

APPENDIX E

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
3201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Office of the District Counsel/SF
P.O. Box 26449
San Francisco, CA 94126-6449

Name: AVETISIAN, MARINE A79-369-862

Date of this notice: 12/24/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/_____
Jeffery Fratter
Chief Clerk

Enclosure

Panel Members:
HURWITZ, GERALD S.

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-369-862 - San Francisco Date: Dec 24 2003

In re: MARINE AVETISIAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lipkin, Inna, Esquire

ON BEHALF OF DHS:
Kevin Lashus
Assistant District Counsel

ORDER

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/_____
FOR THE BOARD

APPENDIX F

STATUTES AND REGULATIONS

8 U.S.C. § 208(b)(1)

"The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title."

28 U.S.C. § 2347(c)

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and
(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new

findings, and the modified order or the order setting aside the original order.

8 C.F.R. § 208.13(b)(1)(i)

"(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

"(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founde64

"(I) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the

following is found by a preponderance of the evidence:

> "(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or
>
> "(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so."

8 C.F.R. § 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.(2) A motion to reconsider a decision must be filed with the Board within 30days after the mailing of the Board decision or on or before July 31, 1996,whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A

motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in§ 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act(8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph(c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened

3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings: (I) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2); (ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing; (iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or (iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.